(30,813)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 848

GEORGE H. BEAZELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO AND WILLIAM H. CHATFIELD, JR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

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Supreme Court of Ohio

No. 18630.

GEORGE H. BEAZELL,
Plaintiff in Error,

vs.

THE STATE OF OHIO AND WILLIAM H. CHATFIELD, JR.,
Defendants in Error.

PETITION IN ERROR.

[Filed June 5, 1924.]

The above named plaintiff in error, George H. Beazell, complains of the defendant in error, the State of Ohio, for that on the 31st day of January, 1924, the Court of Common Pleas of Hamilton county, Ohio, adjudged and imposed sentence against him that he be imprisoned in the Ohio penitentiary and that he pay the cost of the prosecution against him in a certain criminal action then pending in said court, wherein he was defendant and the State of Ohio was plaintiff, and which criminal action was founded on a certain indict-

action of the court in overruling the said motion, the said Beazell then and there excepted.

Sixth: Said Court of Common Pleas erred in overruling the objection of this defendant below to the taking of the depositions in New York to be taken jointly and used jointly against both defendants below, in the above entitled cause, to the taking of said depositions, the said Beazell then and there objected, and excepted to the overruling of said objections.

Seventh: Said Court of Common Pleas erred in overruling the objections and exceptions to the depositions filed herein by said Beazell before the trial of this action, to the ruling of the court in overruling the objections and exceptions thereto, the said Beazell then and there excepted.

Eighth: Said Court of Common Pleas erred in refusing and failing to pass on the objections and exceptions to said depositions before the trial of this cause by said Beazell, to which failure and refusal to pass upon said objections and exceptions the said Beazell then and there excepted.

Ninth: Said Court of Common Pleas erred in the overruling of the motion of the said Beazell for a separate trial as a matter of right and compelling this defendant below to be tried jointly with William H. Chatfield, Jr., and in overruling each and every motion made by the said Beazell for a separate trial and in overruling his objections to a joint trial with the said William H. Chatfield, Jr., to which the said Beazell then and there excepted.

Tenth: Said Court of Common Pleas erred in the admission of certain evidence offered by the state over the objection of said Beazell, to the admission of which said Beazell then and there excepted.

Eleventh: Said Court of Common Pleas erred in the admission of certain evidence rendered incompetent under the acts of Congress offered by the state over the objection of said Beazell, to the admission of which said Beazell then and there excepted.

Twelfth: The said Court of Common Pleas erred in refusing to give each and all of the special charges requested by said Beazell to be given before argument, to which refusal said Beazell then and there excepted.

Thirteenth: Said Court of Common Pleas erred in refusing to give to the jury the special charges and each of them requested by said Beazell to be given after argument and before the general charge to the jury, to which refusal said Beazell then and there excepted.

Fourteenth: The said Court of Common Pleas erred in refusing to give each and all of the special charges requested by said Beazell in the general charge, or in substance in the general charge, to which said Beazell then and there excepted.

Fifteenth: Said Court of Common Pleas erred in refusing to withdraw certain evidence as requested by said Beazell from the consideration of the jury at the close of the State of Ohio's case, to which ruling said Beazell then and there excepted.

Sixteenth: The said Court of Common Pleas erred in refusing to withdraw from the consideration of the jury

as requested by said Beazell certain evidence shown by the record in this case at the close of all the evidence in this case, to which ruling said Beazell then and there excepted.

Seventeenth: Said Court of Common Pleas erred in refusing to grant the motion of said Beazell for an instructed verdict made at the close of the case of the State of Ohio, to the overruling of which motion this defendant below then and there excepted.

Eighteenth: Said Court of Common Pleas erred in refusing the motion of said Beazell for an instructed verdict made at the close of all the evidence in the case, to the ruling the said Beazell then and there excepted.

Nineteenth: Said Court of Common Pleas erred in refusing to permit said Beazell, at the close of the case of the State of Ohio, to have his case immediately argued and submitted to the jury, to which refusal said Beazell then and there excepted.

Twentieth: The said Court of Common Pleas erred in the admission of the evidence offered by the defendant below, William H. Chatfield, Jr., over the objection of said Beazell after the State of Ohio had rested its case in chief, and the said Beazell had rested his case, and requested to be permitted to submit his case to the jury, to which ruling of the court the said Beazell then and there excepted.

Twenty-First: Said Court of Common Pleas erred in the admission of evidence offered by the State of Ohio against William H. Chatfield, Jr., over the objection of said Beazell, after the State of Ohio had rested

its case in chief, and said Beazell had rested his case, and requested permission of the court to submit his case to the jury, and to which ruling of the court said Beazell then and there excepted.

Twenty-Second: Said Court of Common Pleas erred in refusing to grant the motion and request of said Beazell that the jury be instructed to disregard all evidence offered by William H. Chatfield, Jr., or on his behalf, or by the State of Ohio, or on behalf of the State of Ohio, whether on direct examination or cross-examination after the State of Ohio had rested its case in chief, and said Beazell had rested his case and requested that he be permitted to submit his case to the jury and to which ruling of the court in refusing to grant said motion and request said Beazell then and there excepted.

Twenty-Third: Said Court of Common Pleas erred in its general charge to the jury, to which general charge said Beazell then and there excepted.

Twenty-Fourth: That the verdict of the jury is not sustained by sufficient evidence and is manifestly against the weight of the evidence.

Twenty-Fifth: That the verdict of the jury is manifestly contrary to the evidence and the result of passion and prejudice.

Twenty-Sixth: That the verdict of the jury is contrary to law.

Twenty-Seventh: Said Court of Common Pleas erred in overruling the motion of this defendant to set aside the verdict of the jury and for a new trial.

Twenty-Eighth: For other errors of law occurring at the trial to the prejudice of defendant below, George H. Beazell, and excepted to by this defendant below, at the time, as is apparent from the record.

Wherefore, plaintiff in error prays this court that the judgment of the said Court of Appeals and of the said Court of Common Pleas be reversed, set aside and held for naught; that this court render the judgment that said courts ought to have rendered; that plaintiff in error be restored to all things he has lost by reason of said erroneous judgments and for all proper relief in the premises.

POGUE, HOFFHEIMER & POGUE and
WALTER M. LOCKE,
Attorneys for Plaintiff in Error.

WAIVER OF SUMMONS IN ERROR AND ENTRY OF APPEARANCE.

The undersigned, as prosecuting attorney of Hamilton county, Ohio, and representing the State of Ohio, in the cause mentioned in the foregoing petition in error, do hereby waive the issuing and service of summons upon me, in said proceedings in error, and do hereby enter the appearance of the State of Ohio, as defendant in error, in the Supreme Court.

The State of Ohio,
Defendant in Error.
By CHAS. S. BELL,
Prosecuting Attorney, Hamilton County, Ohio, and Attorney of Record in Said Cause.

IN THE COURT OF APPEALS, HAMILTON COUNTY, OHIO.

GEORGE H. BEAZELL,
Plaintiff in Error,

vs.

STATE OF OHIO AND WILLIAM H. CHATFIELD, JR.,
Defendants in Error.

[No. 2436.]

Transcript of Docket and Journal Entries.

1924, February 28. Petition in error, transcript, original papers and bill of exceptions filed.

1924, February 28. Waiver of summons in error and entry of appearance of defendants in error filed.

1924, February 28. Three copies of brief of plaintiff in error filed.

1924, February 28. Receipt for copy of brief filed.

1924, February 29. Minute 59. Entry staying execution.

It appearing to the court that proceedings in error have been instituted in this court, in the above entitled cause, to reverse the judgment rendered by the Court of Common Pleas against this plaintiff in error herein, on application of the plaintiff in error herein and for good cause shown, the execution of the sentence of the Court of Common Pleas and the judgment rendered in

said Court of Common Pleas, are hereby suspended until further order of this court.

1924, February 29. Application to set a day for hearing filed.

1924, March 6. Three copies of brief for defendant filed.

1924, March 6. Receipt for copy of brief filed.

1924, March 14. Amendment and supplement to petition in error of George H. Beazell filed.

1924, June 3. Minute 139. Judgment entry of affirmance at costs of plaintiff in error. Mandate sent to Court of Common Pleas.

This cause came on for hearing upon the petition in error, the transcript of the docket and journal entries, the bill of exceptions, and the original papers from the Court of Common Pleas of Hamilton county, Ohio, and was argued by counsel; on consideration whereof the court finds that there is no error apparent upon the record in said proceedings and judgment prejudicial to the plaintiff in error.

The court further finds that in the Court of Common Pleas and in this court a constitutional question was raised and argued as to whether or not Section 13677 General Code of Ohio, as amended, and as applied to the case at bar, contravenes Section 10 of Article 1 of the constitution of the United States, and Section 1 of the 14th amendment to the constitution of the United States; that said question was raised on the motion of George H. Beazell for a separate trial. This court finds that the overruling of said motion in the

Court of Common Pleas was not error, prejudicial to the rights of the plaintiff in error.

It is therefore considered, ordered, adjudged by the court that the judgment of the Court of Common Pleas of Hamilton county, Ohio, be, and the same is, hereby affirmed.

It is further ordered that the defendant in error, the State of Ohio, recover from the plaintiff in error its costs herein expended.

It is further ordered that a special mandate be sent to the Court of Common Pleas of Hamilton county, Ohio, to carry this judgment into execution.

To all of which the plaintiff in error, by his counsel, excepts.

[Duly certified.]

PETITION IN ERROR.

[Filed February 28, 1924.]

The plaintiff in error, George H. Beazell, says that at the January Term, 1924, at the Court of Common Pleas, Hamilton County, Ohio, the defendant in error, the State of Ohio, recovered a judgment by the consideration of said court against the plaintiff in error, in an action therein pending, wherein the State of Ohio, was plaintiff, and George H. Beazell and William H. Chatfield, Jr., doing business as Beazell and Chatfield, were defendants, this plaintiff in error being the George H. Beazell named as defendant in the court below; the original pleadings and papers, together with a transcript of the docket and journal entries thereof are filed herewith. While this plaintiff in error has made

William H. Chatfield, Jr., one of the defendants below, a defendant in error herein, he makes no complaint against him, except as shown by the record and proceedings herein.

This plaintiff in error complains against the State of Ohio and says that there is error in said record and proceedings prejudicial to the plaintiff in error, George H. Beazell, as appears of record in said case, in this, to-wit:

First: The court erred in overruling the motion of said Beazell to quash the indictment herein, to which ruling of the court he then and there excepted.

Second: The court erred in overruling the demurrer of said Beazell to the indictment herein, to which ruling of the court he then and there excepted.

Third: The court erred in overruling the written demand filed by said Beazell for a separate trial guaranteed to this defendant below by the Constitution of the State of Ohio, and the Constitution of the United States, and by which refusal to grant a separate trial and the proceedings required in a joint trial, the court deprived this defendant below of his right of liberty and trial by jury and abridged his privilege and immunities as a citizen of the United States and denied him the equal protection of the law and deprived him of due process of law in contravention of Article XIV, Section I, of the Constitution of the United States and in contravention of Article I, Section I of the Constitution of Ohio, to the overruling of which written demand the said Beazell then and there excepted.

Fourth: The court erred in the overruling of the motion of said Beazell for a separate trial herein, as a matter of right, for the reason that the indictment herein charged a felony, and at the time of the alleged commission of said crime, the statutes of the State of Ohio gave to this defendant below the right to a separate trial upon his application therefor, and for the further reason that the amendment to the Statute of Ohio, making the granting of said application for said trial discretionary with this court is an ex post facto law within the restrictions imposed by Article I, Section 10, of the Constitution of the United States and a retroactive law under Article II, Section 28 of the Constitution of the State of Ohio and was, therefore, not applicable to the trial of this cause, and in violation of Article I, Section 5 and 10 of the Constitution of the State of Ohio, to which ruling and action of the court in overruling the said motion, the said Beazell then and there excepted.

Fifth: The court erred in overruling the objection of this defendant below to the taking of the depositions in New York to be taken jointly and used jointly against both defendants below, in the above entitled cause, to the taking of said depositions, the said Beazell then and there objected, and excepted to the overruling of said objections.

Sixth: The court erred in overruling the objections and exceptions to the depositions filed herein by said Beazell before the trial of this action, to the ruling of the court in overruling the objections and exceptions thereto, the said Beazell then and there excepted.

Seventh: The court erred in refusing and failing to pass on the objections and exceptions to said depositions before the trial of this cause by said Beazell to which failure and refusal to pass upon said objections and exceptions the said Beazell then and there excepted.

Eighth: The court erred in the overruling of the motion of the said Beazell for a separate trial as a matter of right and compelling this defendant below to be tried jointly with William H. Chatfield, Jr., and in overruling each and every motion made by the said Beazell for a separate trial and in overruling his objections to a joint trial with the said William H. Chatfield, Jr., to which the said Beazell then and there excepted.

Ninth: The court erred in the admission of certain evidence offered by the State over the objection of said Beazell to the admission of which said Beazell then and there excepted.

Tenth: The court erred in the admission of certain evidence rendered incompetent under the acts of Congress offered by the state over the objection of said Beazell to the admission of which said Beazell then and there excepted.

Eleventh: The court erred in refusing to give each and all of the special charges requested by said Beazell to be given before argument, to which refusal said Beazell then and there excepted.

Twelfth: The court erred in refusing to give to the jury the special charges and each of them requested by said Beazell to be given after argument and before the general charge to the jury, to which refusal said Beazell then and there excepted.

Thirteenth: The court erred in refusing to give each and all of the special charges requested by said Beazell in the general charge, or in substance in the general charge to which said Beazell then and there excepted.

Fourteenth: The court erred in refusing to withdraw certain evidence as requested by said Beazell from the consideration of the jury at the close of the State of Ohio's case, to which ruling said Beazell then and there excepted.

Fifteenth: The court erred in refusing to withdraw from the consideration of the jury as requested by said Beazell certain evidence shown by the record in this case at the close of all of the evidence in this case, to which ruling said Beazell then and there excepted.

Sixteenth: The court erred in refusing to grant the motion of said Beazell for an instructed verdict made at the close of the case of the State of Ohio, to the overruling of which motion this defendant below, then and there excepted.

Seventeenth: The court erred in refusing to grant the motion of said Beazell for an instructed verdict made at the close of all of the evidence in the case, to the ruling the said Beazell then and there excepted.

Eighteenth: The court erred in refusing to permit said Beazell at the close of the case of the State of Ohio, to have his case immediately argued and submitted to the jury, to which refusal said Beazell then and there excepted.

Nineteenth: The court erred in the admission of the evidence offered by the defendant below, William H.

Chatfield, Jr., over the objection of said Beazell after the State of Ohio had rested its case in chief, and the said Beazell had rested his case, and requested to be permitted to submit his case to the jury, to which ruling of the court said Beazell then and there excepted.

Twentieth: The court erred in the admission of evidence offered by the State of Ohio against William H. Chatfield, Jr., over the objection of said Beazell after the State of Ohio had rested its case in chief, and said Beazell had rested his case, and requested permission of the court to submit his case to the jury, and to which ruling of the court said Beazell then and there excepted.

Twenty-first: The court erred in refusing to grant the motion and request of said Beazell that the jury be instructed to disregard all evidence offered by William H. Chatfield, Jr., or on his behalf, or by the State of Ohio, or on behalf of the State of Ohio, whether on direct examination or cross-examination after the State of Ohio had rested its case in chief and said Beazell had rested his case, and requested that he be permitted to submit his case to the jury and to which ruling of the court in refusing to grant said motion and request said Beazell then and there excepted.

Twenty-second: The court erred in its general charge to the jury, to which general charge said Beazell then and there excepted.

Twenty-third: That the verdict of the jury is not sustained by sufficient evidence and is manifestly against the weight of the evidence.

Twenty-fourth: That the verdict of the jury is manifestly contrary to the evidence and the result of passion and prejudice.

Twenty-fifth: That the verdict of the jury is contrary to law.

Twenty-sixth: The court erred in overruling the motion of this defendant to set aside the verdict of the jury and for a new trial.

Twenty-seventh: For other errors of law occurring at the trial to the prejudice of the defendant below, George H. Beazell, and excepted to by this defendant below, at the time, as is apparent from the record.

POGUE, HOFFHEIMER & POGUE, and
WALTER M. LOCKE,
Attorneys for Plaintiff in Error.

WAIVER.

Cincinnati, Ohio, February 28, 1924.

The service of summons in the above entitled petition in error is hereby waived, and the appearance of the defendant in error, the State of Ohio, is hereby entered by the Prosecuting Attorney of Hamilton County, Ohio.

CHAS. S. BELL,
Prosecuting Attorney, Hamilton County, Ohio.
By LOUIS SCHNEIDER,
Assistant Prosecuting Attorney.

WAIVER.

Cincinnati, Ohio, February 28, 1924.

The service of summons on William H. Chatfield, Jr., in the above entitled petition in error is hereby waived, and the appearance of said William H. Chatfield, Jr., defendant in error is hereby entered.

CHARLES SAWYER,
Attorney for William H. Chatfield, Jr.

IN THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO.

THE STATE OF OHIO,
Plaintiff,

vs.

GEORGE H. BEAZELL, WILLIAM H. CHATFIELD, JR., DOING BUSINESS UNDER THE FIRM NAME OF BEAZELL & CHATFIELD,
Defendants.

[No. 25315.]

Be it remembered that on the 25th day of October, A. D. 1923, came the grand jurors of said county and upon their oaths presented to the court a certain indictment against the above named defendants clothed in the words and figures following, to-wit:

Reported and filed October 25, A. D. 1923.

The State of Ohio, Hamilton County.

The Court of Common Pleas of Hamilton County:

Term of October in the year nineteen hundred and twenty-three.

Hamilton County, ss.:

The grand jurors of the County of Hamilton, in the name and by the authority of the State of Ohio, upon their oaths and affirmations present that George H. Beazell and William H. Chatfield, Jr., doing business under the name of Beazell & Chatfield, on the 13th day

of February in the year nineteen hundred and twenty-three with force and arms, at the County of Hamilton and State of Ohio, aforesaid, being the agents of Theodore C. Leonard, they the said George H. Beazell and William H. Chatfield, Jr., doing business under the name of Beazell & Chatfield not being then and there persons within the age of eighteen years, and not being then and there apprentices, twenty (20) shares of the capital stock of The Westinghouse Electric Manufacturing Company, a corporation, of the value of thirteen hundred ($1300) dollars, and forty (40) shares of the capital stock (common) of The United States Steel Corporation, a corporation, of the value of four thousand five hundred (4500) dollars, in all of the value of five thousand eight hundred ($5800) dollars, of the personal property of, and belonging to Theodore C. Leonard, did unlawfully and fraudulently, embezzle and convert to their own use, without the assent of the said Theodore C. Leonard their said employer, and without the assent of any owner or owners of said personal property, which said personal property, had then and there, come into the possession and care of them, the said George H. Beazell and William H. Chatfield, Jr., doing business under the name of Beazell & Chatfield by virtue of their employment as agents of the said Theodore C. Leonard as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Chas. S. Bell,

Prosecuting Attorney, Hamilton County, Ohio.

Edna C. Ohenstein and John H. Heid was called and examined and was challenged for cause which was sustained by the court and excused, and Val John Bien was next called and examined and was challenged for cause, which was sustained by the court and excused, and Frank A. Fischer was next called and examined and was passed for cause by counsel for state and defendants. Thereupon counsel for the state peremptorily challenged H. Evan Spencer, who was excused, and Herman Imbus was next called and examined and was passed for cause by counsel for the state and defendants, thereupon counsel for Geo. H. Beazell peremptorily challenged Bertha McConnaughey, which was sustained to all of which counsel for Wm. H. Chatfield, Jr., excepts, and H. Orr was next called and examined and was passed for cause by counsel for the state and defendants, thereupon counsel for defendant, Wm. H. Chatfield, peremptorily challenged Rose Ehrlick, which was sustained by the court and excused, to all of which counsel for Geo. H. Beazell excepts, and Lawrence A. Niehause was next called and examined and was passed for cause by counsel for the state and defendants; thereupon counsel for the state peremptorily challenged Herman Imbus, which was sustained by the court and excused, and Edna Orr was next called and examined and was passed for cause by counsel for the state, and Mrs. Clara Foster asked to be excused on account of having three small children to care for at home, and with the consent of all counsel was excused by the court, and Patrick Connor was next called and examined and

was passed for cause by counsel for the state and defendants, thereupon counsel for defendant Geo. H. Beazell peremptorily challenged Edna C. Ohnstein, which was sustained by the court, to all of which counsel for defendant Wm. H. Chatfield, Jr., excepts, and Hilda Stock was next called and examined and was passed for cause by the state and defendants; thereupon counsel for defendant Wm. H. Chatfield, Jr., peremptorily challenged Stella Straub, which was sustained by the court and excused, to all of which counsel for Geo. H. Beazell excepts, and Emma O. Havlin was next called and examined and was passed for cause by counsel for the state and defendants; thereupon counsel for the state peremptorily challenged Hilda Stock, which was sustained by the court and excused, and George W. Conley was next called and examined and was passed for cause by the state and counsel for defendants, and the panel being complete and all parties to this cause waiving their further peremptory challenges the following persons were accepted who had been sworn on their voir dire, to-wit:

J. R. Coleman, Frank A. Fischer, Lawrence A. Niehaus, Emma O. Havlin, Edwin H. Orr, Josephine Long, Patrick Connor, Lulu Craig, Mollie Bracken, Louise Nieman, Edna Orr, George W. Conley, who are duly impaneled and sworn according to law and the hour of adjournment having arrived this cause was continued until January 8, 1924, at 9 o'clock a. m. The said jury having been taken to the Metropole Hotel for the night in the custody of two court constables.

law within the restrictions imposed by Article 1, Section 10, of the Constitution of the United States and a retroactive law under Article II, Section 28 of the Constitution of the State of Ohio, and was, therefore, not applicable to the trial of this cause, and in violation of Article I, Section 5 and 10 of the Constitution of the State of Ohio, to which ruling of the court in overruling the said motion, this defendant, George H. Beazell, then and there excepted.

Fifth: The court erred to the prejudice of the defendant, George H. Beazell, in overruling the objection of this defendant to the taking of the depositions in New York to be taken jointly and used jointly against both defendants, in the above entitled cause, to the taking of said depositions, this defendant, then and there objected, and excepted to the overruling of said objections.

Sixth: The court erred to the prejudice of the defendant, George H. Beazell, in overruling the objections and exceptions to the depositions filed herein, before the trial of this action to the ruling of the court in overruling the objections and exceptions thereto, this defendant then and there excepted.

Seventh: The court erred to the prejudice of the defendant, George H. Beazell, in refusing and failing to pass on the objections and exceptions to said depositions before the trial of this cause, to which failure and refusal to pass upon said objections and exceptions, this defendant then and there excepted.

Eighth: The court erred to the prejudice of the de-

fendant, George H. Beazell, in overruling the objection made by this defendant and immediately prior to the impaneling of the jury herein to a joint trial of these defendants, to which overruling of the objection this defendant then and there excepted.

Ninth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to grant a motion of the defendant, George H. Beazell, for a separate trial, which motion was renewed after the jury was impaneled herein, to which action of the court, the defendant, George H. Beazell, then and there excepted.

Tenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to grant to this defendant, George H. Beazell, a separate trial, to which refusal, the defendant, then and there excepted.

Eleventh: The court erred to the prejudice of the defendant, George H. Beazell, in the admission of certain evidence offered by the state over the objection of this defendant, to the admission of which this defendant, then and there excepted.

Twelfth: The court erred to the prejudice of the defendant, George H. Beazell, in the admission of certain evidence rendered incompetent under the acts of congress offered by the state over the objection of this defendant to the admission of which this defendant, then and there excepted.

Thirteenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to give each and all of the special charges requested by this defendant to be given before argument, to which refusal this defendant then and there excepted.

Fourteenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to give to the jury the special charges and each of them requested by this defendant to be given after argument and before the general charge to the jury, to which refusal this defendant, then and there excepted.

Fifteenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to give each and all of the special charges requested by this defendant in the general charge, or in substance in the general charge, to which this defendant, then and there excepted.

Sixteenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to withdraw certain evidence, as shown by the record in this case, from the consideration of the jury at the close of the state's case.

Seventeenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to withdraw from the consideration of the jury certain evidence shown by the record in this case at the close of all of the evidence in this case.

Eighteenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to grant the motion of this defendant for an instructed verdict made at the close of the state's case, to the overruling of which motion this defendant, then and there excepted.

Nineteenth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to grant the motion of this defendant for an instructed verdict made

at the close of all of the evidence, to the overruling of which motion this defendant then and there excepted.

Twentieth: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to permit this defendant, George H. Beazell, at the close of the state's case, to have his case immediately argued and submitted to the jury, to which refusal this defendant then and there excepted.

Twenty-first: The court erred to the prejudice of the defendant, in the admission of the evidence offered by the defendant, William H. Chatfield, Jr., over the objection of this defendant prejudicial to this defendant, George H. Beazell, after the State of Ohio had rested its case in chief, and this defendant, George H. Beazell, had rested his case, and requested to be permitted to submit his case to the jury, to which ruling of the court this defendant, then and there excepted.

Twenty-Second: The court erred to the prejudice of the defendant, George H. Beazell, in the admission of evidence offered by the State of Ohio against William H. Chatfield, Jr., prejudicial to this defendant, George H. Beazell, after the State of Ohio had rested its case in chief, and this defendant, George H. Beazell, had rested his case, and requested permission of the court to submit his case to the jury, and to which prejudicial action of the court this defendant, George H. Beazell, then and there excepted.

Twenty-Third: The court erred to the prejudice of the defendant, George H. Beazell, in refusing to grant the motion and request of this defendant, George H.

Beazell, that the jury be instructed to disregard all evidence offered by William H. Chatfield, Jr., or on his behalf, or by the State of Ohio, or on behalf of the State of Ohio, whether on direct examination or cross-examination, after the State of Ohio had rested its case in chief and this defendant, George H. Beazell, had rested his case, and requested that he be permitted to submit his case to the jury and to which action of the court in refusing to grant said motion and request, this defendant, then and there excepted.

Twenty-Fourth: The court erred to the prejudice of the defendant, George H. Beazell, in its general charge to the jury, to which general charge this defendant then and there excepted.

Twenty-Fifth: That the verdict of the jury is not sustained by sufficient evidence and is manifestly against the weight of the evidence.

Twenty-Sixth: That the verdict of the jury is manifestly contrary to the evidence and the result of passion and prejudice.

Twenty-Seventh: That the verdict of the jury is contrary to law.

Twenty-Eighth: For other errors of law occurring at the trial to the prejudice of the defendant, George H. Beazell, and excepted to by this defendant at the time, as is apparent from the record.

January 31st, A. D. 1924. This day this cause came on to be heard upon the motion of defendant, George H. Beazell, for a new trial herein and after arguments of counsel the court being fully advised in the prem-

ises finds said motion not well taken and overrules the same, to all of which the defendant, George H. Beazell, by his counsel, excepts.

January 31st, A. D. 1924. The defendant herein, George H. Beazell, having been convicted of embezzlement of the amount of $5800.00 on a former day of this term was this day brought into court and being informed by the court of the verdict of the jury, and inquired of if he had anything to say why judgment should not be pronounced against him, and having nothing further to say than he hath already said,

It is therefore ordered and adjudged by the court that the defendant, George H. Beazell, be imprisoned in the Ohio State penitentiary at Columbus, Ohio, and kept at hard labor, but without any solitary confinement, for a period of nine years and that he pay the costs of this prosecution for which execution is awarded.

And on application of defendant he is hereby allowed a stay of execution as provided by law for a period of thirty (30) days for the purpose of enabling him to file proceedings in error in the Court of Appeals and hereby allowed thirty days time to file his bill of exceptions.

BILL OF EXCEPTIONS.

[Filed February 18, 1924.]

For the State: Prosecuting Attorney Mr. Charles S. Bell and assistants, Mr. Nelson Schwab and Mr. Louis Schneider.

For the Defendant, Mr. Chatfield: Dinsmore, Shohl & Sawyer.

For the Defendant, Mr. Beazell: Pogue, Hoffheimer & Pogue and Mr. Walter Locke.

Be it remembered, that this cause came on for hearing in the Common Pleas Court of Hamilton county, Ohio, in the January, 1923, term thereof, to wit, on Friday, January 4, 1924.

Thereupon the following proceedings were had:

Mr. Pogue: Before we start to qualify the jury, on behalf of Mr. Beazell we desire to renew our motion for a separate trial.

(Motion overruled and counsel for the defendant, Beazell, excepted.)

Mr. Sawyer: I will renew the motion on behalf of Mr. Chatfield and object to proceeding with the trial of the two defendants jointly.

(Motion and objection overruled and counsel for the defendant, Chatfield, excepted.)

Thereupon the venire of the prospective jurors was called and sworn on their voir dire and examined, and after twelve jurors had qualified and there being no challenge for cause Mr. Pogue on behalf of the defendant, challenged peremptorily Daisey Edwards, one of the twelve jurors that qualified.

Mr. Sawyer: On behalf of the defendant, William H. Chatfield, Jr., we object to the peremptory challenge of this juror, and state we are satisfied with her qualifications and insist she be allowed to remain as a juror in the trial of this case as far as Mr. Chatfield is concerned.

The juror was excused on the peremptory challenge of counsel for the defendant, Beazell, and counsel for the defendant, Chatfield, excepted.

Thereupon twelve jurors having again qualified and there being no challenge for cause. Mr. Sawyer, counsel for the defendant, Chatfield, challenged peremptorily Mary Sullivan, one of the twelve jurors that qualified.

Mr. Pogue: Having demanded a separate trial, and desiring to preserve the ground of our motion, on behalf of George H. Beazell, we object to excusing Mary Sullivan.

The juror, Mary Sullivan, was excused on the peremptory challenge of Mr. Sawyer, and counsel for defendant, Beazell, excepted.

Thereupon twelve jurors having again qualified, and there being no challenge for cause, Mr. Pogue, counsel for Beazell, challenged peremptorily Bertha McConahan, one of the twelve jurors that qualified.

Mr. Sawyer: We object on behalf of Mr. Chatfield. We wish her to be retained on the jury and object to her being excused.

The juror, Bertha McConahan, was excused on the peremptory challenge of Mr. Pogue, and counsel for Mr. Chatfield excepted.

jury that any testimony hereafter introduced may not have any bearing on the case of George H. Beazell.

(Motions overruled and counsel for defendant, Beazell, excepted.)

Mr. Pogue: We request your Honor now to present our case to the jury at this time.

(Request refused and counsel for defendant, Beazell, excepted.)

And thereupon the defendant, Chatfield, to maintain the issues on his part called as a witness:

* * * * * * * * * * *

Mr. Locke: We now make a motion to strike out the testimony of William H. Chatfield, Jr., on behalf of Mr. George Beazell, and each and every question and answer thereto, and that the jury be instructed not to consider that testimony with reference to the case of George H. Beazell.

The Court: The motion will be overruled, and the court will say to the jury as to any testimony that was given by Mr. Chatfield as to any act or statement made or done by the defendant, Mr. Beazell, the testimony of Mr. Chatfield is to be considered by you as applying to Mr. Chatfield only and not to Mr. Beazell.

(Counsel for defendant, Beazell, excepted to the overruling of the motion.)

And thereupon the defendant, Chatfield, rested his case.

Thereupon the state, to further maintain the issues on its part, called in rebuttal,

* * * * * * * * * * *

Mr. Locke: I understand the testimony being closed, on behalf of Mr. George H. Beazell, without waiving any rights which we have reserved by our former motions, objections and exceptions, we now move to strike out all of the evidence of every kind and description, every question and every answer that has been offered since the state rested its case and the defendant, George H. Beazell, rested his case, and that the jury be instructed to disregard all that evidence, and that the jury be instructed to disregard all that evidence in so far as the defendant, George H. Beazell, is concerned.

The Court: The motion is overruled and the jury has been instructed concerning such evidence.

(Counsel for defendant, Beazell, excepted.)

Mr. Locke: We also make a motion at this time on behalf of Mr. George H. Beazell and without waiving any rights reserved by our former motions, objections and exceptions to renew the original motion which we made for an instructed verdict of not guilty on behalf of the defendant, George H. Beazell.

Mr. Sawyer: On behalf of the defendant, Chatfield, we now move the court to arrest the testimony from the jury and direct the jury to return a verdict of not guilty as to William H. Chatfield.

(Both of the above motions made on behalf of the defendant, Chatfield, and the defendant, Beazell, overruled, and counsel for each of the defendants excepted.)

* * * * * * * * * * *

IN SUPREME COURT OF OHIO

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, in the City of Columbus, this 15th January, A. D. 1925.

Seba H. Miller, Clerk of the Supreme Court of Ohio. [Seal of the Supreme Court of the State of Ohio.]

IN SUPREME COURT OF OHIO

No. 18630

GEORGE H. BEAZELL, Plaintiff in Error,

vs.

THE STATE OF OHIO and WILLIAM H. CHATFIELD, JR., Defendants in Error

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed December 24, 1924

To the Hon. C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Now comes George H. Beazell, the plaintiff in error herein and alleges that on the 25th day of October, 1923, an indictment was reported and filed by the Grand Jury of Hamilton County, Ohio, which indictment charged that this plaintiff in error, George H. Beazell, and William H. Chatfield, Jr., (one of the defendants in error herein) doing business under the name of Beazell & Chatfield, on the 13th day of February in the year 1923, in the County of Hamilton and State of Ohio, being the agents of Theodore C. Leonard; they, the said George H. Beazell and William H. Chatfield, Jr. doing business under the name of Beazell & Chatfield and not being then and there persons within the age of eighteen years and not being then and there apprentices, did unlawfully and fraudulently embezzle and convert to their own use without the assent of the said Theodore C. Leonard, their said employer, twenty shares of the capital stock of the Westinghouse Electric & Manufacturing Company, a corporation, of the value of Thirteen Hundred Dollars ($1,300.) and forty shares of the capital stock of the United States Steel Corporation, a corporation, of the value of Forty-five Hundred Dollars ($4,500.) in all of the value of Fifty-eight Hundred Dollars ($5,800.) of the personal property of and belonging to said Theodore C. Leonard. That upon the trial of this cause judgment was rendered

in favor of the defendant in error, the State of Ohio, against this plaintiff in error, George H. Beazell, and the defendant in error, William H. Chatfield, Jr., each of whom were sentenced by the Court of Common Pleas of Hamilton County, Ohio, to the penitentiary of Ohio, for a period of nine years.

Plaintiff in error further alleges that in this cause, on the 19th day of December, 1924, final judgment was rendered against your petitioner by the Supreme Court of the State of Ohio, that being the highest court of law and equity in said State of Ohio, wherein it was adjudged that the Court of Common Pleas of Hamilton County, Ohio, did not err in overruling a written motion filed by this plaintiff in error in said Court of Common Pleas of Hamilton County, Ohio, requesting and demanding a separate trial in said cause, which said written motion was overruled by said Court of Common Pleas of Hamilton County, Ohio; that said Court of Common Pleas did not err at the trial of said cause in overruling a motion made during the progress of the trial by said plaintiff in error, for a separate trial before the jury in said cause was empaneled and sworn; that said Court of Common Pleas did not err at said trial of this cause in permitting the said William H. Chatfield, Jr. to excuse peremptorily, without any cause or reason assigned therefor, certain persons summoned as jurors in said cause over the objection of this plaintiff in error; that the Court of Common Pleas of Hamilton County, Ohio, did not err at said trial of this cause in holding that the provisions of the Act of the General Assembly of the State of Ohio, passed April 5, 1923, approved April 24, 1923, being now Section 13677 of the General Code of Ohio, and filed at the office of the Secretary of State of Ohio April 27, 1923, was a valid Act as applied to this cause and that said act was not in contravention of Section 10 of Article 1, of the Constitution of the United States of America.

In each and all of which rulings and judgments said Supreme Court of the State of Ohio erred to the prejudice of plaintiff in error.

All of which appears in the record, opinion and final judgment of said Supreme Court of the State of Ohio, affirming the judgments of the Court of Appeals of the First Appellate District of the State of Ohio and the Court of Common Pleas of Hamilton County, Ohio, and remanding this cause to said Court of Common Pleas for execution upon said judgment.

Wherefore, your petitioner prays for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed and said cause remanded to said Court of Common Pleas for further proceedings and your petitioner will ever pray.

George H. Beazell, by Pogue, Hoffheimer & Pogue, Province M. Pogue, Harry M. Hoffheimer & Thomas L. Pogue, Attorneys for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 24" day of December, 1924, and the bond heretofore

given by this plaintiff in error in the Court of Common Pleas of Hamilton County, Ohio, is hereby approved and allowed for the purpose and execution of sentence on plaintiff in error is hereby further suspended pending the decision of the Supreme Court of the United States on these proceedings in error herein.

Dated at the City of Columbus this 24" day of December, 1924.

Carrington T. Marshall, Chief Justice Supreme Court of the State of Ohio.

[File endorsement omitted.]

IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed December 2, 1924

Now comes the plaintiff in eror, in connection with the petition for a writ of error herein, and respectfully submits that in the record proceedings, decision and final judgment of the Supreme Court of the State of Ohio, in the above entitled action, there is manifest error in this, to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgments of the Court of Appeals of the First Appellate District of the State of Ohio and the Court of Common Pleas of Hamilton County, Ohio, and in refusing to reverse said judgment and remand this cause to the Court of Common Pleas of Hamilton County, Ohio, for further proceedings.

Second. The judgment of the Supreme Court of the State of Ohio in this cause is repugnant to and in conflict with Section 10 of Article 1 of the Constitution of the United States, which declares that "No state shall * * * pass any * * * ex post facto law."

Third. The Supreme Court of Ohio erred in holding that an act of the General Assembly of the State of Ohio, entitled an Act to Amend Sections 13634, 13635, 13642, 13646, 13650, 13677, 13680, 13682 and 13753 and to repeal 13643 and 13644 of the General Code relative to certain court procedure in criminal cases, passed April 5, 1923, approved April 24, 1923 and filed in the office of the Secretary of the State of Ohio April 27, 1923, and now known as Sec. 13677 of the General Code of Ohio, is not in conflict with and in violation of the provisions of Section 10 of Article 1, of the Constitution of the United States in that the provisions of said section is an ex post facto law as applied to this case wherein the offense was alleged to have been committed on the 13th day of February, 1923. Said Sec. 13677 of the General Code provides as follows:

"When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefor by the prosecuting at-

torney, or one or more of said defendants order that one or more of said defendants shall be tried separately."

Said Sec. 13677 on February 13, 1923, when the offense stated in the indictment was alleged to have been committed, read as follows:

"When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be tried separately."

Fourth. The Supreme Court of the State of Ohio erred in holding that the Court of Common Pleas of Hamilton County, Ohio, did not err in refusing to grant the written motion of the plaintiff in error herein, George H. Beazell, for a separate trial, filed in the Court of Common Pleas before the jury in said cause was impaneled and sworn.

Fifth. The Supreme Court of the State of Ohio erred in holding that the Court of Common Pleas of Hamilton County, Ohio, did not err in the trial of this cause in refusing the motion made during the progress of the trial by the said George H. Beazell for a separate trial, before said jury was impaneled and sworn.

Sixth. The Supreme Court of the State of Ohio erred in finding that the Court of Appeals of the First Appellate District of the State of Ohio did not err in holding that the said Court of Common Pleas of Hamilton County, Ohio, did not err in the several particulars hereinbefore set forth.

Pogue, Hoffheimer, Pogue, Province M. Pogue, Harry M. Hoffheimer, & Thomas L. Pogue, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed December 2, 1924

The above entitled cause coming on to be heard upon the petition of the plaintiff in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and upon examination of said petition and the record in said case and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said case No. 18630.

It is ordered that a writ of error be, and the same is hereby allowed to this court from the Supreme Court of the United States and that the bond heretofore given by said petitioner in the Court of

Common Pleas of Hamilton County, Ohio, be and the same is hereby approved.

Columbus, Ohio, December 24, 1924.

Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[File endorsement omitted.]

IN SUPREME COURT OF OHIO

[Title omitted]

WRIT OF ERROR—Filed December 2, 1924

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Hon. Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said state, in which decision could be had in the said suit between George H. Beazell, plaintiff in error and the State of Ohio and William H. Chatfield, Jr., defendants in error, wherein was drawn in question the validity of a statute of said state on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto and said decision was in favor of such, its validity a manifest error hath happened, to the great damage of the said George H. Beazell as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington on the 23d day of January, 1925, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. William H. Taft, Chief Justice of the Supreme Court of the United States the 24" day of December, in the year of Our Lord, 1924.

B. E. Dilley, Clerk of the United States District Court for the Southern District of the State of Ohio, Western Division, by Harry F. Rabi, Deputy. (Seal United States District Court of Ohio.)

Allowed by Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[File endorsement omitted.]

CITATION—In usual form, showing service on Chas. S. Bell; filed December 2, 1924; omitting in printing

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IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET ENTRIES

Memoranda of Pleadings, &c., Filed, Writs Issued, etc., Judgments, Orders, and Decrees

1924.

Jun. 5. Petition in error, as of right, and waiver of summons filed.
5. Motion for leave to file petition in error, notice and proof of service filed.
5. Application for order suspending execution of judgment and sentence filed.
5. Order suspending execution of judgment and sentence until hearing and decision of cause. C. T. Marshall, C. J. J. 30-18.
13. Court of Appeals transcript, original papers, bill of exceptions and Exhibits (Bill of exceptions same as in No. 18642) filed.
14. Plaintiff's printed briefs on motion filed.
Aug. 22. Defendant's printed briefs and proof of service filed.
Oct. 7. Plaintiff's printed Reply Briefs and proof of service filed.
7. Printed Record filed.
21. Motion for leave to file petition in error to the Court of Hamilton County, Overruled. Journal 30, 105.
21. Petition in error as of right dismissed, no debatable constitutional question involved. J. 30-103. (Vacated, Dec. 19, 1924.)
26. Application for rehearing and acknowledgment filed and sent to the Court.
Dec. 5. Rehearing denied. J. 30-144. (Vacated Dec. 19, 1924.)
19. Judgment affirmed. See Entry. J. 30-161.
24. Petition for writ of error from Supreme Court of United States to Supreme Court of Ohio, filed.
24. Order allowing write of error, filed.
24. Assignment of errors on writ of error filed.
29. Writ of error from U. S. Supreme Court to Supreme Court of Ohio, filed.
29. Citation and entry of appearance, filed.

IN SUPREME COURT OF OHIO

Journal Entries

[Title omitted]

Order Suspending Execution of Judgment and Sentence

1924.

Jun. 5. Error to the Court of Appeals of Hamilton County. Order suspending execution of judgment and Sentence.

"Upon application of the plaintiff in error and upon Notice to the Prosecuting Attorney of Hamilton County, Ohio, attorney for the State of Ohio, the defendant in error herein, and for good cause shown, it is now ordered by this Court that until the hearing and decision of this cause by this court, execution of the judgment and sentence imposed by the Court of Common Pleas of Hamilton County, Ohio, in case No. 25315, on the docket of said Court, wherein the State of Ohio was plaintiff and the said George H. Beazell was defendant, be and the same is hereby, suspended. Enter: C. T. Marshall, C. J."

Oct. 21. Motion for leave to file petition in error to the Court of Appeals of Hamilton County. Journal 30, page 18.

"It is ordered by the Court that this motion be and the same hereby is overruled." Journal 30, page 105.

Order Dismissing Petition

Oct. 21. Error to the Court of Appeals of Hamilton County

"This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, upon the motion of defendant in error to dismiss the petition in error as of right filed herein and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said petition in error be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause. It is further ordered and adjudged that defendant in error recover from plaintiff in error its costs herein expended, taxed at $ —.

Ordered, That a special Mandate be sent to the Court of Common Pleas of Hamilton County, to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County 'for entry.'" Journal 30, page 103.

(This entry vacated. See entry of Dec. 19, 1924.)

ORDER DENYING PETITION FOR REHEARING

Dec. 5. "It is ordered by the Court that application for rehearing in this cause be, and the same hereby is, denied." Journal 30, page 144.

(This entry vacated. See Entry of Dec. 19, 1924.)

JUDGMENT

Dec. 19. Error to the Court of Appeals of Hamilton County

"This cause coming on for hearing upon the petition in error, the transcript, bill of exceptions, the original papers and pleadings from the court of appeals of Hamilton County, of the first Appellate District of the State of Ohio and was argued by counsel;

On consideration whereof the entry of October 15, 1924 and entry of December 5, 1924, made in this cause are hereby set aside, vacated and held for naught.

This cause coming on for further consideration by the Court it is ordered and adjudged that this court does assume jurisdiction in deciding that it is discretionary for the trial judge to allow separate trials for those jointly indicted for the offense charged in the indictment therein, that the same applies to the remedy and manner of trial and the defendant George H. Beazell, plaintiff in error herein, has no vested right in the remedy or manner of trial provided by law, even though same may have been different at the date of the commission of the offense, and it is further ordered and adjudged that the record contains a constitutional question involving Section 10 of Article I, of the Constitution of the United States of America, and this Court having reviewed said question upon its merits, and all other errors assigned by the plaintiff in error herein, does find that there is no error upon the record in said proceedings and judgment.

It is, therefore, considered by the Court that the judgment aforesaid of the Court of Appeals of Hamilton County, Ohio, be and the same hereby is affirmed and that the defendants in error, the State of Ohio and William H. Chatfield, Jr., recover from the plaintiff in error their costs herein expended.

It is further ordered that a special Mandate be sent to the Court of Appeals of Hamilton County, Ohio, and the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment, to all of which the plaintiff in error excepts." Journal 30, page 16.

SUPREME COURT OF OHIO

CERTIFICATE OF LODGMENT

I, Seba H. Miller, Clerk of said Court, do hereby certify that there was lodged with me as said clerk on January 15th, 1925, in the case of George H. Beazell, plaintiff in error, vs. The State of Ohio and William H. Chatfield, Jr., defendants in error:

1. Three copies of the writ of error as herein set forth, one for each defendant in error and one to file in my office.

I further certify that the bond given in the Court of Common Pleas of Hamilton County was, by order of the Chief Justice, continued in force for this proceeding. (See order allowing writ of error.)

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court this 15th day of January, A. D. 1925.

Seba H. Miller, Clerk of the Supreme Court of Ohio. (Seal of the Supreme Court of the State of Ohio.)

[fol. 51] IN SUPREME COURT OF OHIO

[Title omitted]

CLERK'S CERTIFICATE

STATE OF OHIO,
City of Columbus, ss:

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error citation to defendants in error and their entry of appearance, are the original papers filed in this Court in the above entitled cause; that the printed copy of the record attached hereto is a true copy of the record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court and that no opinion was rendered in said cause, other than as stated in the journal entries incorporated herein.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 15th day of January, A. D. 1925.

Seba H. Miller, Clerk of the Supreme Court of Ohio. (Seal of the Supreme Court of the State of Ohio.)

[fol. 52] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed January 22, 1925

It is hereby stipulated and agreed by and between the parties to the above entitled cause, that the certified transcript of record prepared by the Clerk of the Supreme Court of Ohio, and filed with the petition for writ of error, and now on file in the office of the Clerk of the Supreme Court of the United States, shall stand as the return of the said Clerk of the Supreme Court of Ohio to the writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, without the preparation of another transcript, and to this end it shall only be necessary for said Clerk to transmit to the Clerk of the United States Supreme Court a certified copy of this stipulation as his return to said writ of error issued by the Supreme Court of the United States.

Province M. Pogue, Harry H. Hoffheimer, Thomas L. Pogue, Attorneys for George H. Beazell, Plaintiff in Error. Chas. S. Bell, Prosecuting Attorney of Hamilton County, Ohio, for the Defendant in Error.

[File endorsement omitted.]

Endorsed on Cover: File No. 30,813. Ohio Supreme Court. Term No. 848. George H. Beazell, plaintiff in error, vs. The State of Ohio and William H. Chatfield, Jr. Filed January 19th, 1925. File No. 30,813.

(5968)

IN THE

Supreme Court of the United States

No. 8[redacted]247

GEORGE H. BEAZELL,
Plaintiff in Error,

vs.

STATE OF OHIO AND WILLIAM H. CHATFIELD, JR.,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

PROVINCE M. POGUE,
HARRY M. HOFFHEIMER,
THOMAS L. POGUE,
Attorneys for George H. Beazell.

FOLLETT'S BIENNIAL Law Printers, Columbus, Ohio.

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IN THE

Supreme Court of the United States

No. 848

GEORGE H. BEAZELL,
Plaintiff in Error,

vs.

STATE OF OHIO AND WILLIAM H. CHATFIELD, JR.,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This plaintiff in error, George H. Beazell, was jointly indicted with William H. Chatfied, Jr., by the grand jury of Hamilton County, Ohio, on the 25th day of October, 1923, in an indictment charging embezzlement by George H. Beazell and William H. Chatfield, Jr., doing business as Beazell & Chatfield. In this indict-

ment it was alleged that on the 13th day of February, 1923, George H. Beazell and William H. Chatfield, Jr., doing business under the name of Beazell & Chatfield, being the agent of Theodore C. Leonard, did unlawfully and fraudulently embezzle and convert to their own use, without the consent of the said Theodore C. Leonard, twenty (20) shares of the capital stock of the Westinghouse Electric & Manfuacturing Company, a corporation, of the value of thirteen hundred dollars ($1300), and forty (40) shares of the capital stock (common) of the United States Steel Corporation, a corporation, of the value of four thousand five hundred dollars ($4500), in all of the value of five thousand eight hundred dollars ($5800) of the personal property of and belonging to Theodore C. Leonard.

Thereafter, when the indictment had been served upon Beazell, he filed a motion for a separate trial, as shown in the record and proceedings herein. This motion for a separate trial was overruled by the Court of Common Pleas, Hamilton County, Ohio, and exception was reserved. (Record, p. 21.) Thereupon the jury was impaneled and sworn and a trial lasting the greater portion of a month was had and a verdict returned by the jury finding defendant guilty, as charged, and thereafter, the defendant therein, and plaintiff in error herein, George H. Beazell, was sentenced to serve nine years in the Ohio penitentiary at Columbus, Ohio. The case was taken on review to the Court of Appeals of Hamilton county, Ohio, and that court affirmed the Common Pleas Court. (Rec., p. 10.) Thereafter the case

was taken on review to the Supreme Court of Ohio and that court affirmed the lower courts. (Rec. 45.)

A petition for writ of error and assignments of error were filed with the Supreme Court of Ohio by Beazell and an order was made allowing a writ of error and citation for the defendants in error, all of which were duly allowed by the Supreme Court of Ohio. (Rec. 38, 43.

The questions to be determined by your Honors are:

I.

DID THESE VARIOUS COURTS ERR IN NOT GRANTING BEAZELL A SEPARATE TRIAL?

Beazell filed his written motion demanding a separate trial long prior to the date of the trial of the case. This motion was overruled by the court and exception taken. The indictment charges that the offense, the cause of this prosecution, was committed February 13, 1923. The cause of this prosecution was pending from February 13, 1923.

See Bergin v. State, 31st Ohio State, at page 113, wherein the court uses the following language:

> "The phrase 'causes of prosecution' is somewhat vague, and, if standing alone, its meaning might not be easily ascertainable; but when applied to criminal prosecution, standing as it does in connection with 'causes of action in civil cases,' there can be no doubt as to the sense in which it is used in the act. A statutory cause of action, in a civil case, is that given by the statute and upon which the action is based. So, in this statute, the phrase 'cause of prosecution' must be held to mean the offense or crime defined in the statutes, and which gives rise to the prosecution."

On February 13, 1923, when this cause of prosecution arose, Sec. 13677, the Ohio General Code provided:

> "When two or more persons are jointly indicted for a felony, on application to the court for that purpose, **each shall be tried separately.**" (Bold face ours.)

On April 27, 1923, Sec. 13677 was amended (110 Ohio Laws, 301) to read as follows:

> "When two or more persons are jointly indicted for a felony, except a capital offense, they shall be jointly tried, unless the court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants, orders that one or more of said defendants shall be tried separately."

At the time the cause of prosecution arose Beazell was entitled to a separate trial as a matter of right. This right was a substantial and vested right in this defendant and especially so in this case in that the testimony offered herein was voluminous, technical and intricate, some of which was held competent by the court as against the defendant Beazell and not against Chatfield, and some was held competent against Chatfield and not against Beazell. No matter what may be the theory of the law as to the jury, following the charges or instructions of the court, all having experience with juries know that it is impossible for any jury, in a trial extending over weeks, as the record shows, to separate from the mass of evidence, such as was given in this case, that evidence which is competent against one of the defendants and not against the other and

give to that evidence the application and consideration only where it rightfully belongs. Evidence which was admissable against William H. Chatfield, Jr., only would be considered by the jury as evidence against this defendant, George H. Beazell. It would be a physical impossibility for the jury in this case, or any other jury not composed of members with legal training, to differentiate between the evidence that was competent against one and not against the other and give to it its legal application, no matter how clearly they may have been instructed by the court so to do. It necessarily follows that evidence incompetent as against Beazell was considered as evidence against him in finding him guilty as charged. The State relies upon Sec. 26 of the General Code, which provides:

> Wherever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal unless otherwise expressly provided in the amending or repealing section."

Sec. 2 of the amendment of Sec. 13677 (110 Ohio Law, 301) provides:

> "This section shall apply to and affect all criminal actions, prosecutions, and proceedings, and all causes of such action, prosecution or proceedings, existing at the time of such amendment and repeal."

But, the right to a separate trial is a substantial right. It is more than a question of procedure and more than a matter relating to remedy. We, therefore, respectfully contend that the trial court took away from Beazell a substantial right in refusing to grant the motion for a separate trial to the prejudice of the defendant.

It is the purpose of the law to give to the defendant a fair and impartial trial. In carrying out that purpose it will not do to say that the jury were able to select that part of the testimony which alone was applicable to William H. Chatfield and to discard and not consider that in connection with the case of George H. Beazell. Such a proposition need not be discussed. The mere statement of it is sufficient to convince any court that Beazell could not be given a fair and impartial trial if tried jointly with Chatfield and to refuse a separate trial in this case was prejudicial error.

We contend that Sec. 13677, as amended in the 110 Ohio Laws, at page 301, if applied, or intended to be applied to causes of action arising before its passage, is unconstitutional and void as ex post facto and retroactive, and in contravention of Article I, Sec. 10, of the United States Constitution, which reads in part as follows:

> "No state shall * * * pass any * * * ex post facto law * * *.

12 Corpus Juris, Sec. 803, page 1097, says:

> "It is essential to an ex post facto law, therefore, that it relates to criminal matters, that it be retroactive in its operation, and that it alter the

situation of the accused party to his disadvantage, and in general it may be said that any statute passed after the commission of an offense is ex post facto, which alters the situation of any person accused thereof to his disadvantage."

The case of Thompson vs. State of Utah, reported in 170 U. S. 343, at pages 351-2, Justice Harlan delivering the opinion, said:

> "It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of ex post facto laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offense or its consequences alters the situation of the accused to his disadvantage.' "

In the case of Duncan vs. the State of Missouri, reported in the 152 U. S. at p. 378, the fourth syllabus reads as follows:

> "An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then described; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in relation to the offense or its consequences alters the situation of a party to his disadvantage."

In ex parte Medley, reported in 134 U S. at 160, Justice Miller, in delivering the opinion of the court, said:

> "The term ex post facto law, as found in the provision of the Constitution of the United States, to-wit, that 'No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,' has been held to apply to

criminal laws alone, and has been often the subject of constructionn in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased."

In the case of Kring vs. The State of Missouri, 107 U. S., 221-224, section four of the syllabus is as follows:

"Any law is an ex post facto law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences alters the situation of the party to his disadvantage; and no one can be criminally punished in this country except in accordance to a law prescribed for his government by the sovereign authority before the imputed offense was committed and which existed as a law at the time."

In deciding this case, Justice Miller said, in adopting Bishop's definition of procedure in his work on Criminal Procedure:

" 'The term procedure is so broad in its signification that it is seldom employed in our books as a term of art. It includes pleading, evidence and practice.' And in defining practice in this sense he says (quoting from Bishop): 'The word means those legal rules which direct the course of proceeding to bring the parties into the court and the

course of the court after they are brought in,' and evidence, he says, as part of procedure 'Signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.' "

"If this be a just idea of what is intended by the word procedure as applied to a criminal case, it is obvious that law which is one of procedure may be obnoxious as an ex post facto law, both by the decision in Calder vs. Bull, 3rd Dall., 386, and in Cummings vs. Mo., 4th Wall., 277, for in the former case this court held: 'Any law which alters the legal rules of evidence and receives less or different testimony than the law requires at the time of the commission of the offense, in order to convict the offender,' is an ex post facto law."

The rules of evidence are changed by this amendment of 13677 by making it mandatory upon this defendant, instead of optional, that he permit evidence introduced for or against his co-defendant, all of which under former Section 13677 would have necessarily been excluded, because it would have been incompetent in a separate trial of this defendant, but competent when a separate trial is denied, and hence it is casting an additional burden upon this defendant to be present in person and by counsel to protect his rights against the introduction of improper evidence against him individually.

In Ruling Case Law, Vol. 6, Sec. 284, at p. 297, is the following statement:

"The general rule is that any statutory alteration of the regular rules of evidence which would authorize conviction upon less proof, in amount of

> degree than was required when the offense was committed, may be obnoxious to the constitutional inhibition upon ex post facto laws. This rule applies to changes in the measure or character of evidence requisite to conviction, where the situation of an accused is altered to his disadvantage either by excluding evidence in his behalf which was admissible at the time of the alleged commission of his offense or by admitting evidence against him which was inadmissible at such time."
>
> See also Mallet vs. N. C., 181 U. S., 589;
> Kring vs. Mo., 107 U. S., 22.

By compelling this defendant to submit to a joint trial, under the cirmustances, altered the situation to his disadvantage. The amendment denies the defendant the right to exclude a certain line of testimony competent to go to the jury only when forced to trial jointly which would have been excluded from the jury in case of a separate trial. The right to a separate trial was regarded by the legislature as an advantage to the defendant, hence that right was given by the enactment of 13677 as originally passed. That advantage was taken away by the amendment of April 27, 1923, if it is intended to apply to cases wherein the offense was committed prior to the enactment of the amendment. In the case of Rairden vs. Holden, Administrator, 15 Ohio State, 207, at p. 209, Judge Brinkerhoff says:

> "This leads us to inquire what are 'retroactive laws'? Since the introduction of this prohibition into the fundamental law of our state, this court has not had occasion to define it; and so far as we are aware, no similar provision is to be found in the constitution of any of the states of the Union except in that of New Hampshire, which declares that

'retrospective laws' are highly injurious, oppressive and unjust. No such laws should, therefore. be made, either for the decision of civil cases, or the punishment of offenses."

The words "retrospective" and "retroactive," as applied to laws seem to be synonymous, and, as such, they are used interchangeably by Mr. Sedgwick in his treatise on constitutional law.

In the Society vs. Wheeler, 2 Gallison's, 139, a case arising under the constitution and laws of New Hampshire, Mr. Justice Story thus defines a retrospective law:

"Under principle, every statute which takes away or impairs vested rights, acquired under existing laws or creating new obligations, imposes a new duty or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective."

This definitionn of retrospective laws was adopted by Judge Brinkerhoff. In Peters vs. McWilliam, 36 O. S., at p. 162, Judge Johnson, in speaking of Sec. 28, of Article 2, of the Ohio State Constitution, says:

"It is clear that this section prohibits all retroactive legislation, that takes away or impairs vested rights, creates new obligations, or imposes new legal duties or disabilities, in respect to past transactions."

Citing Reardon vs Holden, supra, and Goodale vs. Fennel, 27 O. S., 426:

In the case of the State vs. Morrow, 90 O. S., at 202, a question arose as to when the prosecuting attorney might comment on the failure of the defendant to take

the stand in his own behalf. The Supreme Court, Judge Donahue, rendering the decision, held that at the time of the filing of the transcript from the Magistrate's Court, December 17, 1922, Sec. 13661 of the Ohio General Code was in force, which provided that no comment might be made upon such neglect or refusal of the defendant to take the stand in his own behalf. The constitution of Ohio was amended and went into effect January 1, 1913, and substantially changed the provisions of Article 1, Section 10, by providing:

> "No person shall be compelled in any criminal case to be a witness against himself, but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

The court held that the provisions of Sec. 13361 were in direct conflict with the provisions of Sec. 10, Article 1, of the constitution as amended, that as the proceeding was pending prior to the adoption of the constitution the prosecutinng attorney was bound by that section, and it was error to comment on the failure of the defendant to take the stand in his own behalf notwithstanding the amendment to the constitution. The right to comment is certainly one of remedy or procedure. The constitution, as amended, provided that:

> "All cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law."

This shows that it was not the intention of the framers of the constitution that any substantial rights

of a defendant should be taken from him by the amendments to the constitution, but that he should be tried in the same manner, if the cause of action arose or the action was pending before such amendment, as he would have been tried had the constitution not been so amended

II.

WHAT WERE THE SUBSTANTIAL RIGHTS TAKEN FROM BEAZELL?

1. Chatfield peremptorily excused certain jurors over Beazell's objection and exception, who were perfectly satisfactory to Beazell, had Beazell been tried alone. (Rec., pp. 33 and 34.)

2. When the state rested its case against both Beazell and Chatfield, Beazell asked for an instructed verdict for himself, which, being overruled and exception taken, Beazell asked that the case be submitted on argument on the evidence which had been introduced and objected and excepted to any additional evidence being introduced by Chatfield. (Rec., p. 35.)

3. After Chatfield had introduced his evidence then Beazell moved to strike out the testimony of William H. Chatfield, Jr., which motion was overruled and exception taken thereto. (Rec., p. 36.) The perniciousness is shown in bringing certain things into the case, which were not a part of the case against Beazell, when the State rested and Beazell refused to introduce testimony, and which never could have been a part of the case against Beazell.

The principle of law as announced by this court in Crain vs. United States, 162, U. S., 624, at p. 644, can be well applied here as follows:

> "Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes. Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty. Nor ought the courts in the abhorrence of crime, nor because of their anxiety to enforce the law against criminals to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared."

The principle announced in Thompson vs. The State of Utah, 170 U. S., 352, puts the proposition clearly:

> "But is was held in Hopt vs. Utah, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be ex post facto in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has a vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him."

Cooley, in his work on Constitutional Limitations, 373, on the subject of deprivation of substantial rights of the accused, has said:

> "I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition: (1) Every law that makes an action done before the passing of the law which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.
>
> "All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law, the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective and is generally unjust, and may be oppressive; and there is a good general rule that a law should have no retrospect."

Again Cooley has said:

> "It is not essential, however, in order to render a law invalid on these grounds that it should expressly assume the action to which it relates to be criminal, or provide for its punishment on that ground. If it shall subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility, or if it deprives a party of any valuable right, * * * the law will be ex post facto in the constitutional sense * * *."

Further as is stated in the case of Frisby vs. United States, 13 App. D. C., 22—37 L. R. A. (N. S., 1912), 98, it was in violation of the rights of Beazell for the court to rule as it did in this case and the principle announced in the Frisby case is well applicable here:

> "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be ex post facto because it relates to procedure, as it does, according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by ex post facto legislation because, in the use of a modern phrase, it is called a law of procedure? We think it cannot?"

Considering the two cases upon which the counsel for the State of Ohio rely, we feel that if the facts as exist in this case were such in those cases the court would have decided differently.

In the case of State vs. Barlow, 70 O. S., 363, the court there laid down a proposition of law at p. 372, which we submit is directly applicable to the case at bar:

> "If the change in the law made that criminal which before was not unlawful, or if the new act in any way made it more difficult for the defendant to be guaranteed an impartial jury, or more easy in any way for the state to procure a conviction, or more difficult in any way for the defendant to overturn the case made by the state against him, then there would be force in the proposition of a vested right."

Also, in the case of Hopt. vs. State of Utah, 110 U. S., p. 574, which is relied upon by the counsel for the State of Ohio, at p. 616, this Court said:

> "The provision of the constitution which prohibits the states from passing ex post facto laws was examined in Kring vs. Mo., 107 U. S., 221 (XXVII., 506). The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held, that a provision of the constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of the offense (under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed) was in conflict with the constitution of the United States."

We, therefore, respectfully submit that the judgment rendered by the Supreme Court of the State of Ohio, and the judgments by the Court of Appeals of Hamilton county, Ohio, and the Court of Common Pleas of Hamilton county, Ohio, be reversed, and the said George H. Beazell be granted a new trial for the reasons herein assigned.

PROVINCE M. POGUE,
HARRY M. HOFFHEIMER,
THOMAS L. POGUE,
Attorneys for George H. Beazell.

Supreme Court of the United States

GEORGE H. BEAZELL,
Plaintiff in Error,

No. 848 *vs*

STATE OF OHIO and WILLIAM H. CHATFIELD, JR.,
Defendants in Error.

Supplemental Brief of Plaintiff in Error in Opposition To Motion to Affirm and Dismiss.

On August 12, 1925, during the absence of all counsel for plaintiff in error, a notice was served by counsel for defendant in error that a motion to dismiss the writ of error or affirm the judgment of the Supreme Court of Ohio would be presented by counsel on behalf of the State of Ohio on the 5th day of October, 1925.

Counsel for plaintiff in error supplementing the original brief heretofore filed herein respectfully submit:

FIRST: No sufficient legal reason has been assigned by defendant in error in the motion to dismiss

or affirm nor in the brief filed in support thereof, for a dismissal of the proceedings in error or the affirmance of the judgment of the Supreme Court of Ohio, why this case should not be heard orally and in full on its merits. Neither the Court of Appeals of Hamilton County, Ohio, nor the Supreme Court was unanimous in affirming the judgment of the trial court.

SECOND: None of the authorities cited by defendant in error, all of which are cited and considered or quoted from the brief of plaintiff in error, support the contention of the defendant in error, but on the contrary support each and all of the contentions advanced by plaintiff in error, *viz.*, that this plaintiff in error has been deprived of substantial rights by the trial court and reviewing courts of Ohio in refusing this plaintiff in error a separate trial.

THIRD: That the motion to dismiss and affirm, and the defendant's brief in error in support thereof, fail to establish that the right of defendant in error to a separate trial, was not a vested right under Section 13677 of the General Code of Ohio as provided therein at the time of the commission of the alleged criminal act.

FOURTH: Counsel for defendant in error fail to establish by their motion or brief in support thereof, that Section 13677 as enacted and amended after the commission of the alleged criminal act, was not an *ex post facto* law in its operation and effect in this case, in that it took away and deprived this plaintiff in error of a substantial and vested right, in "altering the situation of the accused party to his dis-

advantage" (*ex parte Medley*, 134 U. S., 160).

FIFTH: Neither by the authorities cited for the State of Ohio nor by any line of reasoning that they have submitted to your Honors, do they combat or meet the authorities cited in our brief that the conduct of the Court in depriving Beazell of the substantial right of a separate trial by jury is violative of Sec. 10, Article 1, of the Constitution of the United States.

SIXTH: This is the primary case on a statute of this character and the accused should be given full time to have his cause presented by an oral argument.

This memorandum is submitted, together with the brief which has been heretofore filed in this case on behalf of George H. Beazell, in opposition to the motion to affirm and dismiss.

Very respectfully,

PROVINCE M. POGUE,
HARRY M. HOFFHEIMER,
THOMAS L. POGUE,
Attorneys for George H. Beazell.

Cincinnati, Ohio, Sept. 15th, 1925.

MAY 28 1925
WM. R. STANSBURY
CLERK

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF

Supreme Court of the United States

October Term, [redacted] 1925

No. [redacted] 247

GEORGE H. BEAZELL,
Plaintiff in Error,

vs.

THE STATE OF OHIO AND WILLIAM H. CHATFIELD, Jr.,
Defendants in Error.

CHAS. S. BELL,
Prosecuting Attorney,

NELSON SCHWAB,
LOUIS SCHNEIDER,
Asst. Prosecuting Attorneys
for the State of Ohio.

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Supreme Court of the United States

October Term, 1924

No. 848

GEORGE H. BEAZELL,

Plaintiff in Error,

vs.

THE STATE OF OHIO AND WILLIAM H. CHATFIELD, Jr.,

Defendants in Error.

MOTION TO DISMISS OR AFFIRM

Now comes the State of Ohio, one of the defendants in error herein, by Charles S. Bell, the duly elected, qualified and acting Prosecuting Attorney of Hamilton County, Ohio, and moves the court to dismiss the writ of error or to affirm the judgment of the Supreme Court of Ohio, heretofore entered herein.

This application is made under and by virtue of authority of Sections four and five of Rule six of the Rules of this court.

CHAS. S. BELL,
Prosecuting Attorney,

NELSON SCHWAB,
LOUIS SCHNEIDER,
Asst. Prosecuting Attorneys
for the State of Ohio.

MEMORANDUM BRIEF IN SUPPORT OF MOTION

Plaintiff in error raises only one question for the consideration of this court.

IS SECTION 13677 OF THE GENERAL CODE OF OHIO AS AMENDED, AND AS APPLIED IN THE CASE AT BAR, REPUGNANT TO THE FEDERAL CONSTITUTION AS AN EX POST FACTO LAW?

STATEMENT OF FACTS

Plaintiff in error, George H. Beazell, was jointly indicted, tried and convicted with one William H. Chatfield, Jr., on a charge of embezzlement, committed on the 13th day of February, 1923, in the Common Pleas Court of Hamilton County in the State of Ohio. (R. 18 and 24 respectively.)

Plaintiff in error was sentenced to a term of nine years in the Ohio Penitentiary. (R. 31.)

The judgment of the Common Pleas Court was affirmed by both the Court of Appeals of the First Appellate District of Ohio and by the Supreme Court of Ohio. (R. 10 and 45 respectively.)

The indictment in this case was returned by the Grand Jury of Hamilton County, Ohio, on October 25, 1923, and the case was tried in the January Term of the Court of Common Pleas in the year 1924.

At the time the offense was committed, to-wit, the 13th day of February, 1923, Section 13677 of the General Code of Ohio read as follows:

> "13677. PRISONER INDICTED, WHEN TO BE DISCHARGED. When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be tried separately."

Subsequently to said date, to-wit, the 13th day of February, 1923, and prior to the date of the return of the indictment, to-wit, October 25, 1923, the legislature of Ohio on April 5, 1923, amended Section 13677 to read as follows:

> "Sec. 13677. When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants, order that one or more of said defendants shall be tried separately."

Section 2 of said amending act reads as follows:

> "This act shall apply to and affect all pending criminal actions, prosecutions and proceedings, and all causes of such actions, prosecution and proceeding existing at the time of such amendment * * * *"

This amendment was approved by the Governor of Ohio on April 24, 1923, filed in the office of the Secretary of State on April 27, 1923, and became effective on July 27, 1923, and is found in Volume 110 of the Ohio Laws, at pages 301 and 303.

At the time of the passage of this amendment, and for a long time prior thereto, there was on the statute books of Ohio a section known as Section 26 of the General Code which reads as follows:

> "26. EFFECT OF AMENDMENT OR REPEAL ON PENDING ACTIONS. Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Application was made by the plaintiff in error to the court for a separate trial under Section 13677 as said section read at the time of the commission of the offense, to-wit, the 13th day of February, 1923. Counsel for the State claimed that Section 13677 as amended applied

to the case of the Plaintiff in Error, which view the court adopted and overruled the application of Plaintiff in Error for a separate trial, to which ruling the Plaintiff in Error then and there excepted, on the ground that applying Section 13677, as amended, made said section an ex post facto law, violative of Section 10 Article I of the Constitution of the United States. (R. 21 and 22.)

ARGUMENT

The Court of Appeals of the First Appellate District and the Supreme Court of Ohio both held that by virtue of Section 26 of the General Code of Ohio, Section 13677, as amended, applied to the case of the Plaintiff in Error, and that said application of said statute as amended violated no provisions of the state or federal constitutions.

It is respectfully contended and urged upon this court that the application of Section 13677, as amended, to the case of the Plaintiff in Error violates no provision of the federal constitution for the following reasons, to-wit:

1. That Section 13677 of the General Code relates solely to procedure.

2. That Plaintiff in Error had no vested right in and to a separate trial.

3. That Section 13677, as amended, and in force at the time of the indictment and trial of Plaintiff in Error was not, as applied to his case, an ex post facto law repugnant to the federal constitution.

The rule is well established that the legislatures of the various states have the right to change statutes relating to procedure at pleasure and that it is violative of no federal provision so to do.

It is equally well established that the legislatures of the various states have not the right to take away from a defendant a vested right by amendment or repeal of a statute between the time the alleged offense was committed and the time of his trial, and the test as to whether a statute relates merely to procedure or to vested rights has been fully enunciated by this court on many occasions. In Hopt vs. Utah, 110 U. S. 574, the court at page 590 uses this language:

> "* * * * But alterations which do not increase the punishment nor change the ingredients of the offense or eliminate facts necessary to establish guilt, but leaving untouched the nature of the crime or the amount or degree of proof essential to conviction only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure."

The court again laid down the rule in Thompson vs. Missouri, 171 U. S. page 380.

In Mallett vs. North Carolina, 181 U. S., 589, the court reiterates the rule, however, in that case the decision was based primarily on the fact that the plaintiff in error had not properly raised the federal question.

This is the rule which has been followed by the courts of last resort of various states so far as we have been able to find and is also laid down by the text writers.

Measuring Section 13677, as amended, by this rule, we respectfully contend that this statute, as amended, did not increase the punishment, change the ingredients of the offense, eliminate facts necessary to establish guilt, and therefor relates to procedure only and is such a statute in which no person can have a vested right, and the state may regulate at pleasure.

CONCLUSION

The question involved in this case has been so uniformly and thoroughly settled in favor of the contention made by the State, that it is respectfully submitted that the motion to dismiss or affirm should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 247, 248.—October Term, 1925.

George Beazell, Plaintiff in Error,		
247	*vs.*	
The State of Ohio and William H. Chatfield, Jr.		In Error to the Supreme Court of the State of Ohio.
William H. Chatfield, Jr.,		
248	*vs.*	
The State of Ohio and George Beazell.		

[November 16, 1925.]

Mr. Justice Stone delivered the opinion of the Court.

Plaintiffs in error were jointly indicted in the Court of Common Pleas of Hamilton County, Ohio, for the crime of embezzlement, a felony. On February 13, 1923, the date of the offense as charged, Ohio General Code, Section 13,677, provided: "When two or more persons are jointly indicted for a felony, on application to the court for that purpose, each shall be separately tried." In April of the same year, before the indictment, which was returned on October 25, this section was amended (110 Ohio Laws, 301) so as to provide:

"When two or more persons are jointly indicted for a felony, except a capital offense, they shall be tried jointly, unless the Court for good cause shown, on application therefor by the prosecuting attorney, or one or more of said defendants order that one or more of said defendants shall be tried separately."

By another section, the amended Act was made applicable to trials for offenses committed before the amendment.

The defendants severally made motions for separate trials on the ground that their defenses would be different; that each would be prejudiced by the introduction of evidence admissible against his co-defendant, but inadmissible as to him; and that they were entitled to separate trials as a matter of right, specifically charging that as applied to their own indictment and trial, "the amendment

to the Statutes of Ohio making the granting of said application for a separate trial discretionary with the trial court, is an *ex post facto* law within the restrictions imposed by Article 1, Section 10 of the Constitution of the United States," which provides that "No State shall . . . pass any . . . ex post facto Law."

Both motions were denied; the joint trial and conviction of the defendants followed; and in proceedings duly had in which the constitutional question was raised, their conviction was sustained by the Supreme Court of Ohio. The case comes before this court on motions to dismiss the writs of error or to affirm the judgment below.

It is settled, by decisions of this court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

But the statute of Ohio here drawn in question affects only the manner in which the trial of those jointly accused shall be conducted. It does not deprive the plaintiffs in error of any defense previously available, nor affect the criminal quality of the act charged. Nor does it change the legal definition of the offense or the punishment to be meted out. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same.

Expressions are to be found in earlier judicial opinions to the effect that the constitutional limitation may be transgressed by alterations in the rules of evidence or procedure. See *Calder* v. *Bull*, 3 Dall. 386, 390; *Cummings* v. *State of Missouri*, 4 Wall. 277,

326; *Kring* v. *Missouri,* 107 U. S. 221, 228, 232. And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring* v. *Missouri,* 107 U. S. 221; *Thompson* v. *Utah,* 170 U. S. 343. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an *ex post facto* law. *Hopt* v. *Utah,* 110 U. S. 575. Nor is a statute which changes the rules of evidence after the indictment so as to render admissible against the accused evidence previously held inadmissible, *Thompson* v. *Missouri,* 171 U. S. 380; or which changes the place of trial, *Gut* v. *The State,* 9 Wallace 35; or which abolishes a court for hearing criminal appeals, creating a new one in its stead. See *Duncan* v. *Missouri,* 152 U. S. 377, 382.

Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy* v. *South Carolina,* 237 U. S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. See *Gibson* v. *Mississippi,* 162 U. S. 565, 590; *Thompson* v. *Missouri, supra,* 386; *Mallett* v. *North Carolina,* 181 U. S. 589, 597.

The legislation here concerned restored a mode of trial deemed appropriate at common law, with discretionary power in the court to direct separate trials. We do not regard it as harsh or oppressive as applied to the plaintiffs in error, or as affecting any right or immunity more substantial than did the statute which changed the qualification of jurors, upheld in *Gibson* v. *Mississippi, supra;* or the statute which granted to the State an appeal from an intermediate appellate court, upheld in *Mallet* v. *North Caro-*

lina, supra. Obviously the statute here is less burdensome to the accused than those involved in *Hopt* v. *Utah, supra,* and *Thompson* v. *Missouri, supra.*

The judgment of the Supreme Court of Ohio is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.